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No. 919

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959 A.D.

TED W. BROWN, SECRETARY OF STATE, ET AL.,
Petitioners,

vs.

JAMES I. KELLER, ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners, appellants below other than Ted W. Brown, Secretary of State, pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above case on February 8, 1960.

I

OPINIONS BELOW

The memorandum opinion and order of December 4, 1958 (R. 26a) and the supplemental opinion and order of March 16, 1959 (R. 30a) of the United States District Court for the Southern District of Ohio, Eastern Division,

are unreported. The opinion in the United States Court of Appeals for the Sixth Circuit of February 8, 1960 (R. 39a) is reported at 274 F. 2d, 779. True copies of said opinions and orders are appended to this petition in the Appendix hereto at pages 7-17.

II

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was made and entered February 8, 1960 (R. 37a). The jurisdiction of this Court is invoked under Section 1254(1), Title 28 U. S. C., which provides:

> "Cases in the Courts of Appeal may be reviewed by the Supreme Court by the following methods:
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; * * *"

III

QUESTIONS PRESENTED

This case involves the question of whether the shareholders of petitioner, The Columbus Mutual Life Insurance Company, can lawfully amend Article V of the charter of that company, prospectively.

Respondents, who claim to be mutual plan, or participating, policyholders of said company sought to enjoin the company's shareholders from amending Article V. The District Court found that under the provisions of Article V equitable ownership of the surplus of the Columbus Mutual Insurance Company is vested in the company's mutual plan or participating policyholders and for that reason enjoined petitioners from taking any action for making effective the proposed amendment to Article V and from taking any action in derogation of Article V as now constituted con-

trary to rights of such policyholders. The Court of Appeals affirmed. The questions presented are:

1. Can the shareholders of the Columbus Mutual Life Insurance Company amend Article V of that company's charter prospectively?

2. Do the mutual plan policyholders of the Columbus Mutual Life Insurance Company possess any vested contractual rights to the future and as yet unearned profits or surplus of that company by virtue of Article V of the company's charter?

3. Did the Court of Appeals err in holding that the proposed amendment to Article V of the Columbus Mutual Life Insurance Company charter would retroactively impair vested rights of the mutual plan policyholders of that company; and, if not, in what respect is said proposed amendment retroactive?

IV

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions and statutes involved are Article I, Section 10 of the United States Constitution; Article XIII, Section 2 of the Constitution of the State of Ohio, and Sections 1701.69 and 1701.71 of the Revised Code of Ohio.

V

SUMMARY STATEMENT OF MATTER INVOLVED

As the opinion of the Court of Appeals in this case correctly states, this action, being case No. 13852 in the Court of Appeals, is a companion case to *The Ohio State Life Insurance Company, et al., v. Clark, et al.*, 274 F. 2d, 771, being case No. 13851 in that court, the latter having been commenced in the District Court three days prior to the filing of this action. The jurisdiction of the District Court

was based upon the amount involved, diversity of citizenship and the existence of a question arising under the Constitution of the United States. The two cases arise out of the same facts and present the same legal issues on the merits. The appellants in the Court of Appeals, defendants in the District Court, are the same in both cases except for Ted W. Brown, Secretary of State, who is not a party to the *Clark* case, *supra*. The District Court consolidated the two cases and heard them together. One judgment was entered for both cases by the District Court.

Following the entry of judgment by the District Court the defendants, other than Ted W. Brown, in this case, and in the *Clark* case, *supra*, appealed to the Court of Appeals.

The Court of Appeals affirmed the judgment of the District Court in the *Clark* case, 274 F. 2d., 771, on February 8, 1960, and rendered its opinion as to the merits in that case. With respect to this action, the lower court likewise affirmed the judgment of the District Court on February 8, 1960. In its opinion in this case, however, the Court of Appeals expressly held that:

> "Insofar as the merits of this appeal are concerned, our ruling in No. 13851 [i. e. *The Ohio State Life Insurance Company, et al., v. Clark, et al., supra*] is controlling."

The court below further stated in its opinion in this case that:

> "For all practical purposes * * * this appeal has no useful purpose, since, regardless of how this appeal is decided all of the appellants are bound by the judgment which has been affirmed in case No. 13851, which involves the same factual situation and the same questions of law."

Petitioners, concurrently with the filing of this petition, have filed their petition for writ of certiorari to review the

decision of the Court of Appeals in *The Ohio State Life Insurance Company, et al., v. Clark, et al.*, supra, and reference is made to that petition and to the Appendix attached thereto for a statement of the factual situation and the issues on the merits involved in this case.

VI

REASONS FOR GRANTING THE WRIT

Petitioners do not seek by this petition a review of the decision of the Court of Appeals in this case insofar as it pertains to and determines the capacity of respondents, plaintiffs below, to maintain this action.

Petitioners seek only a review of the judgment of the Court of Appeals on the merits in this case, which judgment is expressly based upon that court's decision in *The Ohio State Life Insurance Company, et al. v. Clark, supra.*

The reasons why the writ should be granted in this case are, accordingly, identical with those set forth in the petition for writ of certiorari filed contemporaneously with this petition by petitioners in *Ohio State Life Insurance Company, et al. v. Clark, et al., supra,* which are incorporated herein by reference.

If, as petitioners contend, the decision of the Court of Appeals in the *Clark* case, *supra,* should be reviewed, then it necessarily follows that the lower court's decision in this case, which is based upon the *Clark* case insofar as the merits are concerned, should likewise be reviewed.

VII

CONCLUSION

For the reasons stated petitioners respectfully pray a writ of certiorari be granted to review the decision of the lower court in this case.

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APPENDIX

Memorandum Opinion and Order of The United States District Court For The Southern District of Ohio, Eastern Division.

[Filed December 4, 1958]

This cause came on to be considered upon cross-motions for summary judgment filed herein by the original parties to the Clark case on April 1, 1958. Counsel for the plaintiffs, Clark et al. and for defendants, Ohio State Life et al., are agreed that there is no genuine issue as to any fact material to a decision on these cross-motions, and that judgment should be entered as a matter of law; but there agreement ends. Each side claims entitlement to such judgment.

Upon agreement of all counsel, the motion of the Superintendent of Insurance of the State of Ohio for leave to intervene was sustained. The intervenor while not joining in either motion takes the postion that one or the other of the motions for summary judgment should be granted, intervenor's interest being confined to the application of the insurance laws of the State of Ohio.

The motion of Plaintiffs in Civil No. 5149, Keller et al. v. Ted W. Brown et al. to have that case consolidated with Civil No. 5146, the Clark case, and to be joined as moving parties on the summary judgment issue having been sustained, the Keller case plaintiffs are aligned with plaintiffs in the Clark case, and they ask that summary judgment be granted as a matter of law in favor of all plaintiffs.

The Court having carefully considered this matter, the voluminous and able briefs filed, and after numerous hearings, and being fully advised in the premises, finds as counsel have agreed that there is no genuine issue as to any material fact and that judgment should be granted as a matter of law.

The basis for this litigation is quite apparently the surplus accumulated by The Columbus Mutual Life Insurance Company, and decision of the question of ownership of those funds between stockholders on the one hand or policy holders on the other, is dispositive of this action.

In the case of United States Life Insurance Co. v. Spinks, 126 Ky., 405, 422 the court had this to say in defining "surplus" and fixing its ownership:

> "The aggregate of all the excessive collections of premiums in that year constitute that year's accumulation of 'surplus.' This fund is sometimes called, or miscalled 'undivided profits' or 'surplus earnings' or the like. But it represents only the aggregate of overcharges of premiums assessed against the policy holders. The greater it is, the greater the unnecessary exaction that has been made by the insurance company for its policy holders in carrying on the business of collecting from them a sufficient sum to pay all of them the sums agreed at their deaths and in the meantime to pay all the legitimate and necessary expenses of maintenance. If the insurance company doing the business were only a stock company, in the absence of statutory regulation, all 'surplus' or 'profits' would belong to the stockholders. It would represent that much more charged for doing the business than it cost, and would be properly profit. But, where the company is a mutual, being conducted on the plan of giving the cheapest safe insurance to its members, all surplus ought to belong to the members, the policy holders. For, in a purely mutual company there are no stockholders, and no one else therefore to whom the surplus could go than its policy holders. And it should in equity go to those who had contributed it * * * In mixed companies—that is, partly stock and partly mutual—the act creating them usually designates the maximum per cent that shall be paid in dividends to the stock, the residue of 'surplus' or 'net earnings' going to the contributing policy holders. * * * The 'surplus' was what was left after paying the dividends to stockholders, all expenses and all losses, and after providing for all death claims and

for maintaining the reserves. Hence, this 'surplus' should be treated as if the company were purely a mutual company."

The Court is of the opinion that the application of the above-quoted language to the instant case will accomplish a fair, just and equitable result. It is certainly clear that Columbus Mutual is not "only a stock company" nor is it "a purely mutual company." The nature of its entity lies somewhere in between, and can be best described, perhaps, as one of the so-called "mixed companies." However, it is immaterial how the entity is characterized, since it is not "only a stock company." Because of the restrictions placed upon the stock of Columbus Mutual in its articles of incorporation and printed upon the face of issued stock certificates, the Court is of the opinion that the principles of the Spinks case, supra, should apply. "Hence, this 'surplus' should be treated as if the company were purely a mutual company," and the surplus "should in equity go to those who had contributed it." This result affords a fair, reasonable and unstrained construction to the language of Article V of Columbus Mutual's articles of incorporation—"* * * the surplus of the company shall belong to the holders of policies on the mutual plan, * * *." The Court is of the opinion that the equitable ownership of the surplus of Columbus Mutual under the Articles is vested in its policy holders on the mutual plan, that is, in the class of which these plaintiffs are representatives; in the aggregate they are entitled to the whole.

Based upon the foregoing, and upon the entire files and records in this consolidated action, the Court finds that defendants' motion for summary judgment is not well taken and should be and hereby is overruled.

The Court further finds that plaintiffs' motion for summary judgment is well taken and should be and hereby is

sustained and judgment should be entered for plaintiffs and against defendants as a matter of law.

However, pursuant to the request of the intervenor, Superintendent of Insurance of the State of Ohio, contained in his memorandum filed May 2, 1958, the Court will withhold the entry of final judgment herein until all parties have had an opportunity to be heard on the propriety of remedies to be granted to the plaintiffs.

Underwood,
Chief Judge, U. S. District Court.

Supplemental Opinion and Order of The United States District Court for The Southern District of Ohio, Eastern Division.

[Filed, March 16, 1959]

On December 4, 1958, the Court entered its memorandum opinion and order upon the cross-motion for summary judgment then pending herein. In that order, the Court overruled defendants' motion for summary judgment and sustained the summary judgment motion of the plaintiffs in the Clark case, Civil No. 5146, in which motion the plaintiffs in the Keller case, Civil No. 5149, had previously been permitted to join as moving parties. Also in its opinion and order of December 4, 1958, the Court acting pursuant to the request of the intervenor, the Superintendent of Insurance of the State of Ohio, withheld the entry of final judgment herein so that all parties might have an opportunity to be heard on the property of remedies to be granted.

However, at a hearing held in open court on January 9, 1959, notice thereof having been given and counsel for all parties being present, the aforementioned request of the intervenor was withdrawn.

Now, therefore, this matter is before the court for consideration of the judgment to be entered herein, and the Court being fully advised in the premises finds as follows:

(a) That the plaintiffs in the Clark case, Civil No. 5146, are mutual plan policyholders of The Columbus Mutual Life Insurance Company and bring said action as a class action pursuant to Rule 23(a) of the Federal Rules of Civil Procedure on behalf of themselves and all other mutual plan policyholders of said company;

(b) That the Keller case, Civil No. 5149, was similarly brought as a class action pursuant to said Rule 23(a) by the plaintiffs Keller, Purvis and Johnston, later joined by the plaintiffs Eberst and Strunk;

(c) That the Court has jurisdiction of the parties and the subject matter of this consolidated action wherein the matter in controversy exceeds the sum or value of $3,000, exclusive of interest and costs, and is between citizens of different states.

Based upon the foregoing and upon the memorandum opinion and order entered December 4, 1958, which opinion and order shall be considered with this supplemental opinion and order as the final judgment of the Court, all of which shall be effective from the date hereof, it is ordered, adjudged and decreed that summary judgment be and it hereby is entered in favor of the plaintiffs and against the defendants, and therefore the Court does hereby declare as follows:

(1) That the surplus of The Columbus Mutual Life Insurance Company belongs to its mutual plan policyholders, subject only to the limited rights of its stockholders to receive dividends equal to 10% on the par value ($100.00 per share) of their stock and to receive $200.00 per share for their stock upon its retirement;

(2) That The Ohio State Life Insurance Company and the individual defendants who are stockholders of The Columbus Mutual Life Insurance Company cannot exercise their voting power to relieve their stock of the restrictions and limitations they consented and by which they agreed to be bound when they acquired said stock; and

(3) That the mutual plan policyholders of Columbus Mutual would be deprived of vested property rights in the surplus without notice or acquiescence if the proposed amendment were permitted.

In addition to the foregoing declarations, the Court is of the opinion that injunctive relief herein is warranted upon the facts admitted in the pleadings and and upon the finding of the Court and the agreement of all counsel that there is no genuine issue as to any material fact. The Court is of the further opinion that Rule 52 of the Federal Rules of Civil Procedure, to the extent that it applies herein, has been sufficiently satisfied without necessity for further findings.

Therefore, it is ordered, adjudged and decreed that the defendants, The Ohio State Life Insurance Company, the Columbus Mutual Life Insurance Company, Frederick E. Jones, Frank L. Barnes, I. Malcolm McCampbell, Thomas F. Ross, David C. Morgan, Howard W. Kraft, Derrol R. Johnson, Allen G. Aigler, Dr. Rees E. Tulloss, Frank A. Burgess, Stanton G. Prentiss, Robert H. Campbell, Walter F. Eberle, Robert N. Lupfer, Edward A. Sauer, Charles F. Bruny, W. Lyman Case, Ben P. Hadley, Donald J. Hoskins, Carl Mitcheltree, Donald C. Power, Jay Shaw Sr., and Danforth E. Ball, Jr., and Ted W. Brown, Secretary of State of the State of Ohio, and each of them, and their agents and servants and all others acting in their aid or assistance or conjunction, or in aid or conjunction of or with any of them, are hereby perpetually enjoined and restrained from:

(A) Taking any action to make effective the proposed amendment to Article V of the Charter of The Columbus Mutual Life Insurance Company; or

(B) Taking any action in derogation of the terms of said Article V as now constituted contrary to the rights of the plaintiffs under said Article V as such rights are declared herein.

It is further ordered, adjudged and decreed that the Court does hereby retain jurisdiction of this consolidated action for all necessary purposes, including modification of the aforesaid injunctive order, if warranted, and consideration of plaintiffs' request that they be awarded their costs and disbursements, including reasonable attorneys fees, and all other questions presented and not determined herein.

Settlement of journal entry hereof not required.

Underwood,
Chief Judge, U.S. District Court.

Opinion of The United States Court of Appeals For The Sixth Circuit

[Filed February 8, 1960]

Before: McAllister, Chief Judge, Miller, Circuit Judge, and Brooks, District Judge.

Miller, Circuit Judge. This action, being No. 5149 in the District Court, and *Clark, et al. v. The Ohio State Life Insurance Co.*, No. 5146 in that Court and filed three days earlier therein, are companion cases arising out of the same facts and presenting the same legal issues on the merits. They were consolidated by order of the District Court and heard together. One judgment was entered for both cases.

Following entry of judgment, the defendants in both actions appealed to this Court. The appeal in action No. 5146 is No. 13,851 in this Court, *The Ohio State Life Insurance Co., et al. v. Ray A. Clark, et al.* We have this day affirmed the judgment in that case.

The appeal in action No. 5149 is No. 13,852 in this Court, which is the appeal herein being considered. Insofar as the merits of this appeal are concerned, our ruling in No. 13,851 is controlling. However, appellants contend that, irrespective of the merits of the case, the District Court lacked jurisdiction in this case and that the judgment, insofar as it applies to action No. 5149, must be vacated.

Reference is made to the opinion in *The Ohio State Life Insurance Co., et al. v. Ray A. Clark, et al.*, No. 13,851, this day handed down, for a statement of the factual situation and the issues involved. The plaintiffs in that action were mutual plan policyholders of Columbus Mutual, suing on behalf of themselves and of all mutual plan policyholders of that company. In this action, filed on November 15, 1957, the three original plaintiffs, Keller, Johnston and Purvis, brought the action as trustees of the employees' retirement fund of Burdines Department Store of Miami, Florida, which retirement fund was the owner of certain mutual plan insurance policies issued by Columbus Mutual. In this action the plaintiffs proceeded against the same defendants as were proceeded against in the other case and also added as a party defendant Ted W. Brown in his capacity as Secretary of State of Ohio. Injunctive relief was sought against the defendants, which the District Court granted.

Although this appeal is styled Ted W. Brown, Secretary of State, et al. v. James I. Keller, et al., the notice of appeal does not include Ted W. Brown, either individually or as Secretary of State, as an appellant. For all prac-

tical purposes, excepting possibly some questions of costs, this appeal has no useful purpose, since, regardless of how this appeal is decided, all of the appellants are bound by the judgment which has been affirmed in case No. 13,851, which involves the same factual situation and the same questions of law. However, we will briefly refer to appellants' contentions.

The defendants by answer filed August 28, 1958, denied that the plaintiffs, Keller, Purvis and Johnston, were trustees of said employees' insurance fund and affirmatively alleged that they were no longer trustees of said Burdines' pension fund. It is claimed in the brief that they ceased to be trustees on August 1, 1958. This is not strictly a question of jurisdiction, but lack of capacity on the part of the plaintiffs to sue is a bar to the action. *Rule 17 (a), Rules of Civil Procedure; Lewis v. Fontenot*, 110 F. (2) 65, C. A. 5th, cert. denied, 311 U. S. 646, rehearing denied, 311 U. S. 727; *Tringali v. Board of County Commissioners*, 176 F. (2) 110, C. A. 10th. The issue was properly raised under the provisions of Rule 9 (a), Rules of Civil Procedure. No action was thereafter taken to substitute successor trustees, if any were needed. No evidence was received on this factual issue and no ruling made thereon. Unless the facts hereinafter stated require a different ruling, a judgment with respect to this case should not have been entered, in the absence of a hearing on the factual issue and an adverse ruling on the defendants' contention. *Dolan v. Jennings*, 139 U. S. 385; *Lucking v. Delano*, 129 F. (2) 283, C. A. 6th.

On February 26, 1958, the attorney for the plaintiffs filed an application on behalf of J. H. Eberst of Columbus, Ohio, to be made a party to the action, which stated that he was a policyholder of Columbus Mutual and had a common, primary right in the suit, the judgment in which,

since it was a class suit, would be binding upon him. An order was entered on April 9, 1958, joining him as a party plaintiff, individually, and as a representative of the class for whose benefit this action was brought. There was thus added as a party plaintiff one who had capacity to sue. Under the circumstances, we are of the opinion that there was a plaintiff entitled to go forward with the action and that it should not have been dismissed for lack of a party plaintiff with capacity to sue. See: *Continental Oil Co. v. Osage Oil & Refining Co.*, 57 F. (2) 527, 529, C. A. 10th.

We find no merit in appellants' contention that when J. H. Eberst was made a party plaintiff it destroyed diversity of citizenship, with resulting loss of jurisdiction. Jurisdiction was also asserted on the ground of the amount in controversy and the existence of a constitutional question.

The judgment is affirmed.

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[Filed February 8, 1960]

Appeal from the United States District Court for the Southern District of Ohio

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Ohio, and was submitted on briefs.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

Approved for entry:

/s/ Shackelford Miller, Jr.,
United States Circuit Judge.

[redacted]

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No. 919

TED W. BROWN, Secretary of the State, et al.,
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Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

QUESTION PRESENTED

Columbus Mutual Life Insurance Company is an Ohio corporation engaged in the business of life insurance. The corporation's capital structure consists of capital of $500,000.00 which is divided into 5,000 shares of $100.00 par value stock, all of which is issued and outstanding. Pursuant to the Articles of Incorporation, the company writes

life insurance on the mutual plan. At the time of incorporation, certain restrictions were placed upon the stockholders' proprietary rights in the corporation for the benefit of the mutual plan policyholders. Article V of the charter embodies these restrictions and limits the stockholders' rights to dividends at the rate of 10% per annum on the par value of the stock, to payment of $200.00 per share in the event of retirement of the stock, and to have returned to them the amounts paid to the company for the stock over and above the par value of the stock subscribed. The Article further provides that "Subject, however, to the payment of dividends, the retirement of stock, and the return * * * of amounts which have been paid * * * over and above the par value of the stock subscribed, the surplus of the company shall belong to the holders of policies on the mutual plan, * * *."

The question presented in this case is whether the stockholders can amend Article V so as to remove certain restrictions placed upon their proprietary rights for the benefit of the mutual plan policyholders. For the purposes of their petition, petitioners accept that part of the Court of Appeals' decision which holds (1) that the charter of Columbus Mutual Life Insurance Company constitutes a contract between the stockholders and the company made for the benefit of the policyholders on the mutual plan, and (2) that the policyholders possess a vested beneficial interest in the company's existing surplus by virtue of Article V (Pet. pp. 11, 12). Petitioners contend, however, that under the reserved power of amendment contained in Article XIII, Section 2 of the Ohio Constitution, which is conferred upon the stockholders by Sections 1701.69 and 1701.71 of the Revised Code of Ohio, the shareholders are entitled to amend Article V *prospectively*. Respondents contend, as the Court of Appeals held, that the proposed

amendment impairs vested contractual rights of the mutual policyholders contrary to Article I, Section 10 of the United States Constitution.

SUMMARY STATEMENT OF THE CASE

The basic facts in this case are not in dispute but there, however, all agreement ends.[1]

Columbus Mutual Life Insurance Company, herein sometimes called "Columbus Mutual," is an insurance company organized in 1906 under the laws of Ohio. At present, the authorized capital stock is $500,000.00 divided into 5,000 shares of $100.00 par value each, all of which are issued and outstanding. The Company is a stock insurance company issuing policies on the mutual plan (R. 5a).

This case involves a dispute between the stockholders, on one hand, and the policyholders on the mutual plan, on the other, over the meaning and permanence of Article V of Columbus Mutual's Articles of Incorporation. Article V, which has been in full force and effect since incorporation, reads as follows (Appendix 46 and 47):

> "Dividends may be declared and paid on the outstanding stock, provided that the total dividends declared or paid shall not exceed an amount computed at the rate of ten (10) per cent per annum on the par value of the stock from the date of original issue of the date of its retirement, and, provided

[1] In the instant petition, petitioners have, for purposes of a statement of facts and Appendix, incorporated by reference their petition in *Ohio State Life Insurance Company, et al., v. Clark, et al.*, No. 918, a companion case in which a writ of certiorari is simultaneously sought. Therefore, respondents herein, in making record reference, are forced to refer to the Appendix and record in that case. All references hereafter are to the Clark Appendix and record unless otherwise expressly noted.

further, that no dividend will exceed an amount equal to ten (10) per cent per annum on the par value of the stock from the date of its original issue to the date of payment of dividend.

"Dividends on capital stock shall be paid from the surplus of the company, and the directors may pay off from such surplus and retire all of the issued and paid up capital stock at the price of Two Hundred Dollars ($200.00) per share; and may from such surplus, when deemed advisable by the directors, return to the holders of stock the amounts which may have been paid to the company by the stockholders over and above the par value of the stock subscribed and paid for by them respectively. *Subject, however,* to the payment of dividends, the retirement of stock, and the return to the holders of stock of the amounts which have been paid to the company over and above the par value of the stock subscribed, *the surplus of the company shall belong to the holders of policies on the mutual plan, and shall be apportioned and distributed on such equitable plan as the directors may provide.*

"When all of said capital stock *shall have been so retired* and the amounts, if any, paid to the company by stockholders over and above the par value of the stock subscribed and paid for by them shall have been returned, *said company shall be reorganized, reincorporated or converted,* in any manner permitted by law, *into a mutual company composed of the policyholders* in this company. The subscriptions for such stock and the certificates of stock representing the same shall contain a provision whereby the subscriber to and holder of such stock *shall agree and assent to the provisions of this charter.*" (Emphasis added.)

In holding itself out to the general public and to prospective policyholders, the Columbus Mutual has always used the word "Mutual" in its name. Substantially, all of

its policies of life insurance have been written on the mutual plan. There are presently some 160,000 policyholders with policies in force.

On January 6, 1956, The Ohio State Life Insurance Co., set out to gain control of Columbus National. On that date, it purchased 4,810 shares of Columbus Mutual's stock; 5,000 shares were outstanding. Continuing purchases were made so that at the end of 1956, and ever since, The Ohio State Life Insurance Co., has owned 4,977 shares, or, 99.54% of the outstanding stock (R. 5a and 38a).

The Ohio State Life Insurance Co., herein sometimes referred to as "Ohio State," is a stock insurance company existing under the laws of Ohio. Ohio State is chartered to write insurance "on the stock plan" and its amended articles and charter confer no rights whatsoever on its policyholders and impose no restrictions or limitations upon its stockholders (R. 27a and 41a). The company has 100,000 shares outstanding (R. 5a, 9a, 38a and 39a). Measured by any standard, Ohio State is substantially smaller than Columbus Mutual.

On the date each share of Columbus Mutual stock was purchased by Ohio State, it was plainly stated on the face of the certificate (R. 22a and 40a):

> "This certificate of stock is issued and accepted subject to the terms and conditions of the Articles of Incorporation of the Company, to which reference is hereby made."

Article V, in the form set forth above, was in full force and effect at the time these shares were purchased.

At the time Ohio State acquired the stock of Columbus Mutual, it was its plan to so vote the stock so as to merge Columbus Mutual into Ohio State (R. 9a, 13a and 39a).

It is admitted in the record that, "One principal objective of Ohio State * * * in carrying forward their plan and program * * * is to eliminate the restrictions now contained in said Article V" (R. 26a). Ohio State paid $1,300.00 per share for the stock it purchased, or, a total of $6,470,000.00 which was expended out of surplus. The National Association of Insurance Commissioners, an association which determines the valuation at which life insurance companies may carry their investments on their books, determined that so long as the provisions of Article V remained in effect the stock should be carried at $333.00 per share on Ohio State's books (R. 10a and 39a). This resulted in a surplus reduction of $4,805,990.00. However, if the petitioners had succeeded in eliminating the restrictions of Article V, the stock would be reasonably worth $5,000.00 or more per share (R. 6a and 38a). On October 28, 1957, Ohio State voted its stock for a resolution to amend the Articles of Incorporation by striking out Article V and substituting in its place and stead the present proposed amendment (R. 15a, 16a, 17a and 39a).

The proposed amendment to Article V provides in substance that (1) the unassigned surplus as of December 31, 1956, shall be held and used as a special surplus for policyholders for protection of the holders of participating policies of the company, and no dividends to any stockholders of the company shall be payable therefrom; (2) anually, for a period of twenty-five (25) years, there shall be added to this special surplus from the earnings of the company a sum equal to the net earned interest rate on the mean invested assets after all taxes based on income; (3) regular dividends shall be paid from the earnings of the company to all participating policyholders without distinction, and additional dividends may be paid out of the special surplus for policyholders, as the directors in their

sole discretion may from time to time provide, only to the holders of participating policies of the company in force on the effective date of the amendment; (4) in the event of dissolution and liquidation at any time so long as any participating policies of the company in force on the effective date of the amendment are then in force, such policyholders shall be entitled to distribution from such special surplus, as then existed, in amounts representing their percentage interest in such surplus at the time of the effective date of the amendment; and (5) at the maturity of the last participating policy in force on the effective date of the amendment, the special surplus, as then existing, shall be permanently held for the protection of all policyholders, and no dividends may at any time be declared to shareholders, except out of surplus over the above such amount (R. 14a, 15a, 16a, 17a and 39a).

This proposed amendment was presented to the Secretary of State of Ohio, Ted W. Brown, for filing. He, in turn, submitted the certificate of amendment to the Attorney General. In October, 1959, the Attorney General advised the Secretary to refuse to record the amendment. An action of mandamus was filed, thereafter, seeking a writ directing the Secretary of State to record the amendment on the records of the State. The Supreme Court, in a decision reported in 167 Ohio 309, refused to grant the writ on the basis that the Attorney General had not found and certified that (1) the amendment was in accordance with Revised Code of Ohio, and, that; (2) the amendment was consistent with the Constitutions of the United States and the State of Ohio (R. 7a and 39a).

The present case was commenced by the filing of a complaint on November 17, 1957 in United States District Court for the Southern District of Ohio, Eastern Division. The action was filed as a class action on behalf of all

mutual policyholders of Columbus Mutual. Equitable jurisdiction was invoked and injunctive relief was prayed to restrain adoption of the proposed amendment. Three days earlier, the action in *The Ohio State Life Insurance Company, et al., v. Clark, et al.*, 274 F. 2d 771, had been commenced on behalf of the Columbus Mutual policyholders in the same District Court. The *Clark* action sought a declaratory judgment declaring, *inter alia*, that the stockholders of Columbus Mutual were without power or authority to amend Article V. Both of the actions were founded upon the presence of a Federal question presented under Article I, Section 10 of the United States Constitution and upon diversity of citizenship, there being an amount in controversy in excess of $3,000.00 (R. 4a, 5a, 6a and 38a).

On December 4, 1958 the District Court, pursuant to respondent's motion, consolidated this case with the *Clark* action (R. 59a and 60a). Motions for summary judgment were filed by both sides. The petitioners in their motion requested the Court to hold that Article V neither created nor conferred any contract rights in or upon the policyholders of Columbus Mutual.

Thereafter, the District Court entered its memorandum opinion in the consolidated action granting the policyholders' motion for summary judgment and overruling petitioner's motion for summary judgment (Appendix 25 to 28). In that opinion, the District Court held that the equitable ownership of the surplus of Columbus Mutual, under the company's charter, is vested in the policyholders on the mutual plan and that, in the aggregate, such policyholders are entitled to the surplus. The opinion and order were augmented by a supplemental opinion and order in the consolidated cases on March 16, 1959, which perpetually

enjoined the petitioners from altering Article V to the prejudice of the mutual policyholders' rights thereunder (Appendix 28 to 31).

After entry of one judgment in the consolidated case, the petitioners herein caused two separate appeals to be perfected to the Court of Appeals for the Sixth Circuit. One in the instant case, the other in the *Clark* case, *supra*. On February 8, 1960, the Court of Appeals entered its opinion, 274 F. 2d 779, affirming the judgment in this case; on the same day by separate opinion, 274 F. 2d 771, (Appendix 31 to 45) the Court of Appeals handed down its opinion in the *Clark* case also affirming. The promulgated opinion in the *Clark* case contains a recitation of the facts and discussion of the issues involved, for convenience and brevity, the *Clark* opinion is incorporated by reference into the opinion in this case.

The Court of Appeals held that Columbus Mutual was a stock life insurance company issuing policies on the mutual plan; that in such a company the stockholders and the mutual policyholders each have certain rights which are controlled by the Articles of Incorporation; that Article V controlled the extent to which the usual rights of the stockholders were curtailed; that under that Article the stockholders have the right to elect directors and manage the business but that their proprietary rights in the assets of the company are limited to dividends at the rate of 10% per annum on the par value of the stock, and to the payment of $200.00 per share upon retirement plus any amounts paid above par value of the stock subscribed; that the Article gave the mutual policyholders a vested contract right to the beneficial interest in the surplus, subject to the prior limited claims of the stockholders therein; that the charter constituted a contract between the stockholders

and the corporation for the benefit of the policyholders on the mutual plan, and that the policyholders could maintain action upon this contract; and, finally, that the judgment of the District Court should be affirmed. 274 F. 2d 771; (Appendix 31 to 45).

ARGUMENT

I.

THIS CASE PRESENTS NO SPECIAL OR IMPORTANT QUESTION WHICH WARRANTS CONSIDERATION BY THIS COURT

The principal question presented in this case involves construction of Article V of the charter of Columbus Mutual Life Insurance Company. The whole case turns on this construction problem and the case has no precedent significance beyond the unique language of the article.

There are three kinds of insurance companies, each with definite characteristics. A pure *stock company* is one in which the stockholders contribute the capital, pay the losses and take all the profit. The insured policyholders and the proprietary interests in the corporation are separate and distinct classes. Profits, over and above liabilities and accumulations required by law, belong to the stockholders in a collective sense and may be distributed as dividends. The ultimate assets of the corporation, at liquidation, are owned by the stockholders. 1 Joyce, *The Law of Insurance*, 733 §326; 1 *Richards on Insurance*, 27 §8; 2 *Couch on Insurance*, 2d ed., 159, §19. In a strictly *mutual company* there are no stockholders, but the insured themselves are members of the company, entitled to manage its affairs through the officers and to amounts over and above funds retained to meet losses and other liabilities. The members of a mutual company in their aggregate or corpo-

rate capacity are the insurers, while individually they are the insured. Surplus of a mutual insurance company belongs to the mutual policyholders and distribution thereof, or dividends therefrom, are governed by the charter, contract policy and the applicable state statutes. 1 *Richards on Insurance*, 27, §8; 18 Appleman, *Insurance Law and Practice*, 147 §10059.

The third type is the so-called *mixed company* which embodies characteristics of both the stock company and the mutual corporation. This term is one of convenience and the classification covers all insurance companies which do not fit in the other two categories. Although used to describe an in-between-land and not a separate and distinct legal creature with precisely articulated form and substance, nevertheless, the classification is well recognized and has ample precedent. *Equitable Life Assurance Society v. Bowers*, 87 F. 2d 687 (2d Cir. 1937); *Ohio Farmers Indemnity Co. v. Commissioner*, 108 F. 2d 665 (6th Cir. 1940); *Am. Exch. Underwriters v. United States*, 68 Ct. Cl. 36; *Pink v. Town Taxi Co.*, 138 Me. 44 (1941). Mixed companies have both stockholders and mutual policyholders. The distinguishing feature, or common ingredient, is a sharing in the profits and surplus accumulation. The division which is made is based upon the provisions of the charter. Distribution of the profits or surplus is generally made by designating a fixed sum to be paid as dividends to the stockholders, the residue being turned over to the policyholders. 44 *Corpus Juris Secundum*, 610 §93; *Royal Trust Co. v. Equitable Life Assurance Society*, 247 F. 437 (2nd Cir. 1917); *United States Life Insurance Company v. Spinks*, 126 Ky. 405 (1907).

Columbus Mutual is a mixed company. Both the District Court and the Court of Appeals so held; petitioners do not disagree. This entire litigation concerns the re-

spective rights of the stockholders, on one hand, and the mutual policyholders, on the other, to the profits and surplus. To determine this question reference to the corporate charter was necessary. All parties agree that Article V of Columbus Mutual's Articles of Incorporation is the pertinent provision. The Court of Appeals succinctly states the issue—"The proper construction to be given to this provision in Article V is the real issue in the case." The opinion, 274 F. 2d 771, construes that article as placing a contractual limitation on the usual proprietary rights of the stockholders, such restriction being engrafted into the charter for the benefit of the policyholders on the mutual plan. Further, that this article gave "to the policyholders on the mutual plan a vested contract right to the beneficial interest in the surplus, subject to the prior limited claims of the stockholders therein." The decision holds nothing *more* or nothing *less* than that the stockholders may not amend Article V to lift these proprietary restrictions or to usurp the rights of the policyholders in the surplus. The permanent inhibiting injunction of the District Court to this effect is affirmed by the Court of Appeals.

It is apparent, from the foregoing, that this case turns entirely upon the provisions of Article V of Columbus Mutual's charter. That article is the core of the case. The decision below lays down no broad rule of law, but concerns itself only with the proper construction of Article V. As precedent, the case has no meaning outside the exact language of that article since the decision depends entirely on its wording.

This narrow problem of construction, involving a unique corporate charter provision and with no significance as precedent, does not have sufficient importance to warrant consideration by this Court.

II.

NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED WHICH REQUIRES A DECISION OF THIS COURT

Since the outset of the litigation, the stockholders have taken the position that Article V conferred no rights whatsoever upon the policyholders to either present or future surplus. In their motion for summary judgment in the District Court they asked the Court to so hold and they persisted in this request in the Court of Appeals.

For the purposes of their petition, petitioners now accept that part of the Court of Appeals decision which holds (1) that the charter of Columbus Mutual constitutes a contract between the stockholders and the company made for the benefit of the mutual policyholders, and (2) that the policyholders possess a vested beneficial interest in the company's *existing* surplus by virtue of Article V. Petitioners insist, however, that under the reserved power of amendment contained in Article XIII, Section 2 of the Ohio Constitution, which is conferred upon the stockholders by Sections 1701.69 and 1701.71 of the Revised Code of Ohio, the stockholders are entitled to amend Article V *prospectively.*

Petitioners further contend that the proposed amendment to Article V is *prospective* in character and does not disturb the vested rights of the mutual policyholders; that the reserve power to amend contained in the Ohio Constitution authorizes and permits the charter amendment; and, that the Court of Appeals decision in holding that the amendment would unconstitutionally impair contract obligations of the stockholders, collides with the State of Ohio's reserve power to amend and presents a substantial federal question.

This contention does not withstand careful analysis.

A. The Proposed Amendment Is Not Prospective In Character.

Petitioner's contention rests on the cornerstone that the proposed amendment is prospective only and does not impair vested contractual rights of the mutual plan policyholders. The contention expressly recognizes that if the proposed amendment is not prospective in character it is prohibited by both Ohio law and Article I, Section 10 of the Federal constitution. The argument falls down because the cornerstone is not sound.

1. Understandably, petitioners attempt to present the issue within the frame of reference of existing, set aside, surplus *versus* future unearned surplus. This focus of attention facilitates argument that the proposed amendment does not disturb the vested rights of the policyholders since it does not effect existing surplus. But this approach ignores the contractual terms of Article V by which the stockholders are bound.

Article V does more than place the existing surplus, as at any given time, in the mutual plan policyholders. The language also draws a tight constricting circle around the proprietary rights of the stockholders. This curtailment of the stockholders' rights represents a contractual obligation of the stockholders to the corporation made for the benefit of, and enforceable by, the mutual plan policyholders. The full scope of the policyholders' contract rights requires that the circle constricting the stockholders proprietary rights be enlarged in no respect, and, that the perimeter be breached at no point.

The proposed amendment, since it entirely removes all proprietary limitations on the stockholders, destroys contract rights which reside in the policyholders, and, therefore, the amendment is not prospective.

2. The mutual plan policyholders, some 160,000 in number, have purchased life policies from Columbus Mutual. The insurance contracts call for level, or fixed premiums. These premium rates have been, and are, in excess of the company's requirements to provide the insurance contracted. Past premium excesses are the source of present surplus; the premium excess on the policies presently in force gives rise to a built-in, assured, growth in surplus.

The proposed amendment strikes out the restrictions placed upon the stockholders' proprietary rights and in so doing transfers the assured increment in surplus from these premium excesses to the stockholders. This is contrary to the guarantee of Columbus Mutual's charter which, at the time the policy contracts were entered, clearly stated that the surplus, subject to the limited proprietary rights of the stockholders, belonged to the policyholders, and, therefore, deprives the policyholders of vested rights.

3. The proposed amendment would eliminate from the charter that which is now inherent; that upon dissolution or liquidation of Columbus Mutual all of its surplus would belong, and be distributed, to its *then* policyholders on the mutual plan. The amendment would substitute a provision that in the event of dissolution or liquidation, those of the *present* policyholders whose policies were *then* in force would receive *only* "amounts representing their percentage interest" in the "special surplus for policyholders," "at the time of the effective date of the amendment." The policyholders, for whose benefit the special surplus is set aside and held under the proposed amendment, become a closed class under the amendment at its effective date. As each policyholder in the class dies, prior to dissolution or liquidation, the stockholders inherit that policyholders' ratable part of surplus and upon extinction of the entire class

before dissolution or liquidation, the stockholders take the entire surplus. Thus, the stockholders by the proposed amendment have placed themselves in such a position that the *existing* surplus and all future increment therein will ultimately belong to them. This, of course, deprives the policyholders of their vested rights to own the surplus.

B. The Ohio Constitution's Reserved Power to Amend Corporate Charters Does Not Authorize the Proposed Amendment and No Federal Question Is Presented by the Court of Appeals Decision Prohibiting the Amendment.

It is the petitioners' position that, since an Ohio statute confers on the stockholders the power to amend the charter, Ohio law authorizes the proposed amendment. The petitioners then vigorously urge that the Court of Appeals decision, since it prevents the amendment, substantially nullifies the reserved power to amend of the Ohio Constitution, thereby, giving rise to a substantial federal question.

1. It is worthy of note that the stockholders have made attempts, at the state level, to give legal effect to the proposed amendment. The amendment was lodged with the Secretary of State of Ohio for filing but that officer, upon advice of Ohio's Attorney General, refused to record the amendment. Later, the Supreme Court of Ohio, in a mandamus action seeking to compel the Secretary to record the amendment, held that no writ of mandamus should issue, since the Attorney General had failed to certify the amendment as in accordance with the laws of Ohio and the Constitution of the United States. The petitioners are thus in the anomalous position of contending that the Court of Appeals decision, in prohibiting the amendment, nullifies the Ohio Constitutions' reserved amendment power, while

the State of Ohio itself, acting through its executive and judicial branches, has refused to authorize, record or give legal efficacy to the amendment.

2. Petitioners' position is unsound because it twists Ohio's reserved power to amend out of its appropriate place in the structure of Ohio law, and attempts to use the reservation in a mannner contrary to its constitutional purpose. The Federal Constitution, in particular Article I, Section 10, inhibits states from adopting legislation impairing the obligation of contract. This Court in *The Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819) held this sanction to apply to charters of incorporation. Most states, like Ohio, have adopted reserve clauses in their Constitutions or statutes so as to permit full exercise by the state of its legislative powers with respect to state chartered corporations without abridgment of the Federal Constitution.

Ohio has conferred upon stockholders the power to amend corporate charters by Section 1701.69 and 1701.71 of the Revised Code of Ohio. This power, however, is not synonymous or coextensive with the reserved power to amend corporate charters which Ohio has reserved unto itself through its Constitution.

Petitioners attempt to lift a power reserved to the State of Ohio out of its place in the state's legal structure, and use it as authority for the stockholders to breach their charter contract with the corporation. Petitioners do not point out how they came to be possessed of the state's reserved power to amend. (Certainly the statutory provision which, as a part of Ohio's general corporate law, allows stockholders to amend, does not transplant the reserved power to them.) Further, the state's reserved power authorizes its own legislative action in derogation of

its own contract obligations as embodied in state granted corporate charters. The reserve power does not, and cannot, empower the stockholders to adopt amendments which obliterate their contractual obligations embodied in the corporate charter for the benefit of third persons.

Certainly, the Court of Appeals decision which enjoins breach of the contractual obligations of the stockholders of Columbus Mutual, does not interfere in the smallest measure with Ohio's right, under the reserved power to amend, to take such legislative action as she deems fit and necessary as to domestic corporations.

III.

THE DECISION OF THE COURT OF APPEALS ON WHAT IS ESSENTIALLY A STATE QUESTION IS IN ACCORD WITH THE LAW OF THE STATE OF OHIO

Primarily, this case involves the construction of a charter provision of an Ohio insurance corporation. In holding that this provision gave rise to a contract between the stockholders and the corporation made for the benefit of the policyholders, the Court of Appeals expressly relied upon the law of the place of incorporation, Ohio. In determining that the provision was enforceable in equity by the policyholders for whose benefit it was included in the charter, the Court of Appeals followed the law of Ohio as laid down in *Bell v. The Union Central Life Insurance Co.*, 14 Ohio C. C. R. (N. S.) 385 aff'd w/o opn. 87 Ohio St., 475, rehr. 92 Ohio St., 521 (1914). Thus, the decision involves essentially a state question.

The *Bell* decision lays down the law of Ohio on the subject. That decision rejects the prior case of *State ex rel. Ellis v. Union Central Life Insurance Co.*, 13 Ohio C. C. R.

(N. S.) 49, aff'd w/o opn. 84 Ohio St., 459 (1911), which is relied upon by the petitioners. The *Ellis* case was an action of quo warranto commenced by the State of Ohio to prevent the Union Central Life Insurance Co. from declaring a stock dividend out of accumulated surplus. The issue before the Court was whether the insurance company had misused its franchise. The opinion states, "The Court cannot in this action concern itself with the rights of the policyholders or stockholders, but can only consider wherein some public mischief is done or threatened." When subsequently a policyholder brought action, the Court upheld an injunction preventing the proposed stock dividend out of surplus.

Petitioners reliance upon *Beldon v. Union Central Life Insurance Co.*, 73 Ohio App. 49, aff'd 143 Ohio St. 329 (1944), *Polk v. Mutual Reserve Fund*, 207 U. S. 310 (1907) and *Wright v. Minnesota Mutual Life Insurance Co.*, 193 U. S. 657 (1904), is entirely misplaced. Those cases are not in point, because in none of those cases was there involved an express charter provision placing ownership of the surplus in the policyholders and, in each of those cases the insurance company involved was acting under an express statutory authority authorizing the amendment and prescribing the method.

CONCLUSION

In conclusion, therefore, we respectfully submit that the present petition presents no important question that can only be resolved by a decision of this Court. The case presents a narrow problem of construction of a unique corporate charter provision and has no significance as precedent; no real or substantial federal question is involved; essentially the Court of Appeals for the Sixth Circuit has resolved the issue on the basis of the law of Ohio and in so doing has correctly applied the law of that state.

The petition for certiorari should be denied.

Respectfully submitted,

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